

1 that you can't do an upgrade or a modernize or
2 replace.

3 MR. LANGLEY: We are negotiating as
4 recently as this morning before the hearing. We are
5 negotiating that.

6 ADMIN. JUDGE SIPPEL: Okay. Does it look
7 like you're getting there?

8 MR. LANGLEY: I think we're making
9 progress. We owe them a response to their responses
10 to our responses to their first proposal.

11 MR. SEIVER: I'm not sure where we are in
12 that process, but I do think it's -- the ball is in
13 your court.

14 MR. LANGLEY: That is true. I believe
15 that is true.

16 MR. SEIVER: And your honor, the
17 discussions today, I think, have helped inform us
18 even more as to the scope of a stipulation. And in
19 fact, I don't know if this is possible. I'm just
20 going to suggest it now. I could almost see that we
21 could probably stipulate almost to every relevant
22 fact that would have to be proved by a fact witness

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1 and reduce it purely to expert and legal testimony
2 about what the APCO standard means when it says loss
3 to the owner versus value to the taker, because our
4 position is going to be that a lot of what Gulf Power
5 talks about is some value to the cable operator as
6 opposed to something that they're really out -of-
7 pocket. If we could nail down on what the cost
8 issues are, we might be able to even have this really
9 be some valuation experts and maybe one or two
10 engineering experts and then, your honor, it would be
11 the briefing as to well, does replacement cost
12 methodology satisfy the standard, or does the cable
13 rate formula. You know, things like that.

14 MR. LANGLEY: That might be a
15 possibility, although I was really looking forward to
16 a trial getting the costs of --

17 ADMIN. JUDGE SIPPEL: Well, now let me --
18 obviously, I'm -- what you're saying to me is very
19 positive, but very possible, but as I have been
20 looking upon this and getting this case ready for
21 trial, has been in effect getting the deck of cards
22 that the experts can look at to testify to and say,

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1 well, yes, that's reliable numbers because of this,
2 that, and the other thing, and here's where we go
3 with those numbers. And I've been feeling frustrated
4 because somehow or other, we just can't get to that
5 point where there's going to be the solid record that
6 both experts are going to look at the say, here's
7 where I go on that, and here's where I go on that.
8 This seems to be worthwhile this morning, because we
9 seem to be getting closer and closer and closer to
10 what those experts are going to -- what the universe
11 is that both experts are going to get. The only
12 reason that we have to get into discovery on nitty -
13 gritty records like make-ready and whatnot is because
14 you can't agree as to the reliability of numbers.
15 And if you can, you know, within a framework, if you
16 can agree to reliability, then we can move on.
17 Unless I'm missing some point.

18 MR. SEIVER: No, your honor. And just as
19 a follow-up on that, one of the issues that we've
20 been talking about today is, and which we will get to
21 is, for example, on the Osmose report, we don't have
22 anything other than this statement of, and I forget -

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1 - forgive me if I'm wrong, I think it's 7,823 poles
2 out of the 9,000 that were examined, we don't have
3 anything to show which pole, who's on it, you know,
4 what are the parameters, why it's full, and we've
5 been talking about when we're going to get that kind
6 of information. And although we are convinced, and I
7 think that it would be legal error not to go on a
8 pole-by-pole basis to make a determination as to a
9 full pole, our experts, if we're doing our summaries
10 tomorrow, will not have seen, except for the
11 statement of work, will not have seen anything that
12 says, okay, pole at the corner of, you know, I'll
13 make up Palifax and Chase -- I don't know -- I used
14 that the other -- Palifax and Chase, on the northeast
15 corner, is a full pole and look at it and have our
16 experts say, yes, it is, or no, it isn't. We don't
17 have that. And I'm not sure -- I know I'm jumping
18 ahead, but this is your honor's concern about getting
19 this thing ready for hearing and getting this -- if
20 we're going to do a pole-by-pole basis, I don't know
21 if Mr. Langley intends to put in 7,823 proffers on
22 individual poles, which then we would say, yes or no

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1 to it, and which your honor would have to say, yes, I
2 agree, or no, I disagree. That concerns me.

3 ADMIN. JUDGE SIPPEL: Well, I don't think
4 that -- I'm not going to put -- hold Mr. Langley's
5 feet to the fire on that one just yet. I mean we --
6 this is -- I've been constantly going back to this
7 again and again and again. They've got the burden of
8 proceeding and the burden of proof. If they fail,
9 then they fail. If they make it, they make it. And
10 how he does it, you know, there's all kinds of
11 imaginative ways to try cases like this, and I have
12 to wait until he's ready to do it. Now, I'm not
13 trying to undercut your discovery because of that.
14 And this is why I think I've been very -- you know,
15 you've gotten a lot of discovery.

16 MR. SEIVER: We have.

17 ADMIN. JUDGE SIPPEL: And you know, maybe
18 it's getting into areas that we don't need that much
19 discovery on. That's what I'm hearing this morning.

20
21 MR. COOK: Although, you're honor, just
22 seconding my colleague's comment. For example, you

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1 even ,to help the process along, directed Gulf Power
2 to file a three -pole-proffer as to full capacity.
3 Here we are, approximately three and a h alf weeks
4 away from what you'd said in the end of March or
5 early April as the close of discovery. Even that
6 proffer doesn't tell us where those poles are so we
7 can send our experts out to look at them. So we'll
8 come to this later, and I don't want to interrupt the
9 flow of the discovery order, but it is central to
10 everything we do including remaining depositions that
11 we need to talk about that we get a chance to have
12 identified to us specific poles that they're going to
13 say are at full capacity. Otherwise, discovery
14 closes. We have had no chance for the experts to say
15 and no chance for us to go out and see which poles
16 they're going to rely on. And I would add one last
17 sentence, which is Mr. Langley said a moment ago, you
18 know, hey wait, that's not fair. You saw on the
19 description of evidence back in 2004 that make -ready
20 was an issue. But as to specific poles, it all comes
21 down to that, even if they take the position now
22 three quarters of our poles are at full capacity, any

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1 pole that you're on, complainants, that has had make-
2 ready done while you've been attached is a pole at
3 full capacity. We still have to say which are those
4 poles. Identify them.

5 ADMIN. JUDGE SIPPEL: Well, I think I've
6 been very specific in my directions on those things
7 in terms of requiring them, I mean even to the point
8 of requiring them to go I think beyond perhaps what
9 Rule 34 requires and have them identify the poles
10 that are already on existing maps. So, you know, I'm
11 not discarding at all your point. I'm not putting
12 that aside at all. I'm just simply trying to go down
13 these outstanding discovery requests one -by-one and
14 find out what's going on and what can we do to move
15 the process along.

16 MR. COOK: Sounds right.

17 ADMIN. JUDGE SIPPEL: We'll get to
18 Osmose.

19 MR. LANGLEY: Your honor, may I.

20 ADMIN. JUDGE SIPPEL: Yes. Go ahead.
21 I'm sorry.

22 MR. LANGLEY: I wanted to address the

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1 proffer, the three -pole-proffer of the Osmose
2 evidence. It did not have a street address, but it
3 did have a GPS locator that I believe is a ccurate
4 within -- is it three feet or ten feet -- three feet,
5 so I mean there's very specific location data that
6 was submitted without proffer. And with the Knology
7 make-ready work order packet that we submitted, the
8 specific poles identified do in fact have street
9 addresses on them. Let me see if I can find that.
10 For example, I'm looking at K -42, page 23, of the
11 evidentiary proffer, and it identifies the map as 40 -
12 45 and the address as 1801 Georgia Court. So, I mean
13 I believe the evidence that we submi tted with our
14 proffer is pretty specific.

15 ADMIN. JUDGE SIPPEL: Is there any
16 problem. Again, that proffer was required -- so --
17 as an idea -- so that -- certainly so that I could
18 understand what it is in a tangible way what you're
19 talking about. But if you wanted to check out -- do
20 you have enough information to check out what's in
21 that proffer?

22 MR. COOK: Your honor, responding to that

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1 specific point with respect to the three poles which
2 was your honor's order, show us three poles that are
3 at full capacity, I looked at those pages, and
4 there's computerized data, but we haven't been given
5 the backup to show how to interpret that to tie it
6 into a location to go look at it. With respect to
7 the Knology materials that he included, that was
8 material you did not call for that he added on, and
9 at that time, we did not understand them to be saying
10 all of these are at full capacity.

11 MR. LANGLEY: I believe we said that in
12 our proffer, and I don't think your honor's order
13 limited us to three poles from the Osmose report. I
14 understood that to be --

15 ADMIN. JUDGE SIPPEL: No. No. Go ahead.
16 Go ahead. I'm sorry.

17 MR. LANGLEY: I didn't mean to interrupt
18 you, your honor.

19 ADMIN. JUDGE SIPPEL: No. But I'm not
20 saying no that it was you're wrong. I'm saying, no,
21 you're right. I was not limiting it to Osmose poles.
22 Go ahead.

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1 MR. LANGLEY: We understood your order to
2 say, hey, give me a sampling of how you're going to
3 prove crowding. And so for the -- to round out the
4 picture, we include the Knology make-ready work order
5 packet and explained how we contend that shows
6 crowding on a pole-by-pole basis.

7 ADMIN. JUDGE SIPPEL: Well, you know, I -
8 - Mr. Cook, I mean --

9 MR. COOK: That's news to us, your honor.

10 ADMIN. JUDGE SIPPEL: Well, this is why,
11 you know, you should be talking about this away from
12 me. I mean this is, you know, you get something in
13 the mail, you don't understand it, you pick up the
14 phone, and you call your counterpart, and you say
15 what's going on here, and, you know, they explain it
16 to you. I mean I don't know why I should have to be
17 doing that with you today.

18 MR. COOK: Well, I think the thing is
19 that that I believe came in on October 17th, and the
20 final report with Osmose was due less than two weeks
21 later or two weeks later on Halloween, and we were
22 expecting in the final Osmose report to get a listing

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1 and identification of the specific poles, using your
2 honor's own phrasing, pin down one-by-one that are at
3 full capacity. And instead, we got four pages of
4 which -- all we got was 9,663 poles. They're mostly
5 from one area, Pensacola served by Cox. You know, we
6 might survey some others. But there's no backup for
7 this, no identification, no pinning down one -by-one
8 of which poles are at full capacity. But we are
9 jumping ahead here.

10 ADMIN. JUDGE SIPPEL: You're talking
11 about the Osmose report now?

12 MR. COOK: Right.

13 ADMIN. JUDGE SIPPEL: All right. Well,
14 we're not on that yet. You know, we're not on that
15 yet. I'm trying to address the concerns that you
16 raise with respect to the sample pole that they
17 submitted. All right. Well, I'm going to just pass
18 off of that. I told you what my purpose for
19 requiring that was, and to the extent that purpose
20 has been met, it's fine. If you all want to, you
21 know, use that as a basis to negotiate what kind of
22 evidence you think that the record is going to need,

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1 that's fine too. But I again go back to what I've
2 been saying. They've got the burden of proof. The
3 only thing that I'm requiring them to do is to give
4 you sufficient advance notice of what proof they're
5 going to put in so that you can be ready for purposes
6 of cross examining or in any other way of
7 undercutting the validity of their factual basis for
8 their arguments. And to the extent that you need to
9 put on positive evidence yourself, which I would
10 expect would be primarily through experts, because
11 you don't really have a burden of proving anything.
12 So, you know, let them do their thing. Let the Gulf
13 Power do its thing, and, you know, I just want to be
14 sure that you're not surprised by anything.

15 MR. COOK: Right. And I think, this is
16 my final comment on this point, is that all of our
17 questions in discovery have been motivated by trying
18 to say tell us before the hearing, Gulf Power, which
19 poles you're going to come forward with. And they --
20 now that we understand they're taking the position
21 all poles that have make -ready including 14,000 for
22 Knology as a blanket assertion, we might be able to

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1 go and pick out poles to challenge some of their
2 assertions. But --

3 ADMIN. JUDGE SIPPEL: Well, let's just --
4 let them take it one step at a time.

5 MR. COOK: Right. Okay.

6 ADMIN. JUDGE SIPPEL: Now I think that
7 request number 12 would be then next one. The -- oh,
8 yes, an unregulated marker for pole space.

9 MR. COOK: Yes, your honor, and with
10 respect to this, there are really two points. Your
11 honor had said in the second discovery order, I
12 believe it was provide some more identification on
13 this point, and there were two issues --

14 MR. LANGLEY: No. I didn't mean to cut
15 you off, but we're going to do this. We're going to
16 actually give them the specific Bates labels of the
17 documents that --

18 MR. COOK: But there's an important
19 clarification here, which is your supplemental
20 responses identify two categories of unregulated
21 market documents. One was within Bates range,
22 forgive me your honor, it's approximately 800 to

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1 2,400 or something.

2 ADMIN. JUDGE SIPPEL: It's over 1,400
3 documents.

4 MR. COOK: Right. You directed them,
5 within that range -- now I remember, it's 1,483
6 documents -- tell us which of those are the
7 unregulated market, but I don't want the court here
8 to lose sight of the second category in their
9 supplemental responses. There was a reference to
10 certain other documents available in our files. And
11 it's that also that we want to have produced and not
12 see it the first time in the pre --file direct
13 testimony.

14 MR. LANGLEY: I guess I do need to
15 address the second part of that. The documents --
16 the other documents, I think, were largely
17 duplicative, but to insure that we had produced
18 everything, those were made available at the
19 corporate headquarters when John and Rita Tewari came
20 down to Gulf Power. John, you can tell me if I'm
21 wrong. I thought you all had actually reviewed those
22 documents.

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1 MR. SEIVER: We did review documents, but
2 I don't know, unless I pick them up one at a time and
3 show them to somebody to say is this what you're
4 relying on as evidence of unregulated market or not?
5 I don't know.

6 MR. LANGLEY: Well, it's not as difficult
7 as they're making it sound. The documents we're
8 relying on as evidence of the unregulated market are
9 the agreements where people are paying an unregulated
10 rate and are joint use agreements and the billing for
11 those respective agreements. It's going to be a
12 discrete amount of documents that we contend support
13 the unregulated market. It's really o--

14 ADMIN. JUDGE SIPPEL: Well, how long --
15 are you going -- how long is it going to take you to
16 identify those documents for them?

17 MR. LANGLEY: I think your honor set a
18 deadline for December 9th. And we --

19 ADMIN. JUDGE SIPPEL: Okay. And you're
20 going to meet that?

21 MR. LANGLEY: Absolutely.

22 ADMIN. JUDGE SIPPEL: All right. So

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1 there. I think you have your answer. All right.
2 You're going to get -- the documents within the --
3 the 1,483 Bates numbered documents. And then you're
4 going to get identification of agreements and the
5 other documents that Mr. Langley referred to for the
6 other documents. So I'm going to rely on that being
7 done. What date did I give you on that? December
8 9th.

9 MR. LANGLEY: December 9th.

10 ADMIN. JUDGE SIPPEL: Okay. Request
11 number 15 was specify full capacity on the pole maps
12 that were pre -Osmose, full capacity, due December
13 9th. That's the over and above task that I assigned
14 to you, and that's being done also. Is that correct?

15 MR. LANGLEY: Yes, your honor.

16 ADMIN. JUDGE SIPPEL: All right. So, Mr.
17 Seiver or Mr. Cook, you, you know, when you receive
18 that, then you'll know what you're getting.

19 MR. COOK: Okay. Could I ask for one
20 clarification on that point?

21 ADMIN. JUDGE SIPPEL: Sure.

22 MR. COOK: When we issued that request,

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1 if you look back to the language of our request, we
2 said look at the maps and things created before the
3 Osmose report up to February 2005. I believe your
4 honor expanded on that to say all of the maps and
5 materials that identify poles at full capacity and
6 taking us right up to the present. And I was
7 wondering if we would see all of that on December
8 9th.

9 ADMIN. JUDGE SIPPEL: Not all of the
10 Osmose maps. This is all the maps that they -- I
11 thought at somewhere along the line I had met that --
12 narrowed that specification as that's what I assumed
13 was being asked for. You got Osmose's in category
14 one, but that's coming.

15 MR. COOK: Okay.

16 ADMIN. JUDGE SIPPEL: And you got all
17 these other maps that they had previously prepared
18 for whatever reason, but these are maps that identify
19 pole locations. So, you know, my logical type of
20 question to myself was well, why can't we use that as
21 a starting base or a comparative base by havi ng the
22 identify which of those are at full capacity. And

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1 then, you know, this is where we are today. So
2 that's going to be done by December 9th, correct?

3 MR. LANGLEY: Correct.

4 ADMIN. JUDGE SIPPEL: And it's -- let us
5 be clear that that will not include the Osmose maps,
6 any Osmose maps that they have created, or are you
7 will to go beyond and do that, too?

8 MR. LANGLEY: We actually are willing to
9 go beyond, but part of it is for a matter of
10 efficiency. The way the Osmose survey has worked is
11 they have loaded into their system these geospatial
12 maps, and then they can overlay their data on those
13 maps. So the ones that we give them on the 9th will
14 actually be map-size paper that has -- you'll be able
15 to see streets and there will be dots where we have
16 crowded -- not crowded, on the actual map.

17 ADMIN. JUDGE SIPPEL: All right. That's
18 very good.

19 MR. SEIVER: And just so I know, will
20 there be an explanation of who's on the pole and what
21 parameter led to your conclusion that it's crowded or
22 not crowded?

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1 MR. LANGLEY: That is the data that we
2 are working to give you in electronic format so that
3 you will be able to actually go to a specific pole
4 and then see all of the engineering data that Osmose
5 has collected. I can't guarantee that that will be
6 on the 9th, but I'm hopeful that it will be.

7 MR. COOK: I think, your honor, a few
8 issues down the road, that raises the question of
9 schedule and when we would -- whether we would see
10 that before a deposition of Osmose.

11 ADMIN. JUDGE SIPPEL: Mr. Cook, you' re
12 always three steps ahead of me.

13 MR. COOK: Okay. Sorry, your honor.

14 ADMIN. JUDGE SIPPEL: We'll get to that.
15 All right. That takes me through the status of the
16 document request I believe.

17 MR. SEIVER: Yes, your honor.

18 ADMIN. JUDGE SIPPEL: Did I miss
19 anything?

20 MR. SEIVER: No. We're up to the
21 interrogatories.

22 ADMIN. JUDGE SIPPEL: All right. Now

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1 before I move on, though, let me ask the Bureau. Is
2 there anything in terms of all of this back and
3 forth, is there anything that the Bureau wishes to
4 interject in terms of information that the Bureau
5 would be expecting to see? Just how much do you want
6 to participate in this? Obviously you're
7 participating. I didn't mean to put it that way, but
8 if you --

9 MR. LIEN: We don't have anything to
10 interject, your honor.

11 ADMIN. JUDGE SIPPEL: Thank you. Let's
12 start with the interrogatories, then. Interrogatory
13 number eight, include poles that are having
14 noncompliant attached, in other words, yes, poles
15 that have attachments that are not complainant's
16 attachments. The answer is okay. It seems to me the
17 answer is okay, but can you just explain -- expand a
18 little bit on that, Mr. Langley.

19 MR. LANGLEY: Your honor, may I have a
20 moment to pull this response up so I can --

21 ADMIN. JUDGE SIPPEL: Yes. Go ahead.
22 I've got interrogatory 8, 20, 34, 35, and 46. I'm

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1 reading in my note. My note says to me that the
2 answer you gave seems to be okay, but I'm looking for
3 a little bit more discussion and explanation.

4 MR. LANGLEY: Your honor, what we tried
5 to do here was to lay out the process of comparing
6 the documents, because it became apparent to me that
7 they actually did not understand how to -- how a
8 permit relates to a distribution service order and
9 what information is revealed in the distribution
10 service order. I erroneously assumed that the
11 operators new how that worked. But I take them on
12 their word that they don't. And so what we've done
13 here is lay that out on a step-by-step basis. If you
14 are looking for a particular pole, you go to the
15 permit number which includes the pole. The permit
16 number refers you to a distribution service order,
17 and they have these permits. And then the
18 distribution service orders are actually pretty easy
19 to find if you know what you're looking for. And so
20 what we endeavored to do here is to say this is how
21 you find out what you're looking for. It's really
22 pretty -- I'm sorry --

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1 ADMIN. JUDGE SIPPEL: That's okay. And
2 then those records are in some kind of folder files
3 that are easily retrievable?

4 MR. LANGLEY: They are, and all of this,
5 the make -ready process is managed at a very local
6 level, and Gulf Power service territory runs from the
7 Florida-Alabama border over by Pensacola east over to
8 Panama City, so we're talking about a fairly limited
9 geographical scope. It does not extend through the
10 better part of Florida. And there are, Ralph, 11 or
11 12 engineering and construction offices? I think 11
12 or 12 where all this make -ready is done. So for
13 example, let's take Cox Communications, for example,
14 the engineering and construction offices to which Cox
15 would submit a permit request and through which make -
16 ready work orders would have been prepared, are all
17 in the Pensacola area. And you can even get further
18 detail based on where in Pensacola, because there's,
19 I believe, four or five engineering construction
20 offices within Pensacola. And so if they knew that
21 they wanted to look at Pace and what was it, Palafox
22 and Chase? If they wanted to look at that pole that

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1 John referred to on the corner of Palafox and Chase,
2 they would know what office they would have gone to
3 to submit their permit application, and that would be
4 the office where the actual make -ready file is kept.

5 And then you look at the numbers. You'd see
6 distribution service order 123. You'd go to that
7 one, and you'd pull it out.

8 ADMIN. JUDGE SIPPEL: But I heard you say
9 something that depending on how finite the
10 information is, it might -- some of the information
11 might be stored and kept in other offices.

12 MR. LANGLEY: That's true. For example,
13 Comcast. They don't operate in Pensacola. They
14 operate, I believe, principally in the Panama City
15 area. And then northward into Bay County. So all of
16 their permit applications and, incidentally, all of
17 their -- the make -ready orders prepared pursuant to
18 those requests would be kept in either the Panama
19 City Beach office or the Panama City office depending
20 where in Comcast territory the make -ready project
21 occurred. But they would know. I mean because they,
22 Comcast, would physically, someone would either call

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1 their local guy at the engineering and construction
2 office and say, hey, I need, yes, I want a permit, 50
3 new attachments, and so they know what office to
4 call.

5 MR. COOK: May I respond at the
6 appropriate time.

7 ADMIN. JUDGE SIPPEL: No. I just want to
8 ask one more -- I'm trying to get a clarification
9 here. If they asked for all the -- I don't know if
10 I'm trying to listen to myself -- but all of these
11 records that you're referring to from Comcast, would
12 it be -- I mean if they asked that up front, could
13 those records made available in one place for them to
14 come and look at, or were they going to have to go to
15 one, two, or three offices to get them, the full
16 picture

17 MR. LANGLEY: For Comcast, it would
18 probably be two offices, because there's a beach
19 office, and I may be wrong about this. They may all
20 be kept in the actual Panama City office. There's
21 two offices in that area, Panama City and Panama City
22 Beach. So it could be two offices --

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1 ADMIN. JUDGE SIPPEL: It seems to me that
2 if the complainants don't let you go forward with
3 that process, that you're going to have to make all
4 the records that they ask for to look at available in
5 one place. I think that's unreasonable to ask them
6 to jump around from office to office.

7 MR. LANGLEY: You're referring to per
8 complainant?

9 ADMIN. JUDGE SIPPEL: Well, at least per
10 complainant. Now we're talking about the difference
11 between -- you're looking at -- obviously I can
12 understand wanting to see the complainant records --

13 MR. COOK: And that's an important point
14 of clarification, because this request goes to
15 attachments involving parties other than
16 complainants.

17 ADMIN. JUDGE SIPPEL: I understand that.
18 That's my point. That's my point. That could be a
19 lot more -- I mean how many parties are we talking
20 about, non-complainant parties are we talking about?
21 Do you know?

22 MR. LANGLEY: I do. We've actually

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